EDITOR'S NOTE

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NO. 87-648

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

MICHAEL CEPHAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

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November, 1987

QUESTION PRESENTED

1. Should not certiorari be denied where a state court suppressed statements made during custodial interrogation after finding, with ample support in the record, that respondent suffered from a severe mental illness which left him incompetent to waive his constitutional right against self-incrimination, as this Court has always required that such a waiver be made knowingly and intelligently?

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STATEMENT OF THE CASE

Respondent was arrested on October 7, 1983, and charged with a rape said to have occurred on September 29, 1983. On April 19, 1984, after taking testimony over two days of hearings, the Honorable Bernard Avellino, of the Philadelphia County Court of Common Pleas, entered an order suppressing statements made by respondent to police during custodial interrogation. Findings of Fact and Conclusions of Law (attached as Appendix "C") were announced in open court on July 25, 1984.

The lower court found that respondent had "an extensive history of profound mental illness" and "had been consistently diagnosed as a schizophrenic of the most serious type" (Finding One, Appendix "C"); that respondent was manipulated by his police interrogator, who was aware of respondent's mental illness (Findings Fifteen through Eighteen, Appendix "C");[1] and, most

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[1] In its Statement Of The Case, petitioner ignores this and almost all of the express findings of the suppression court. Petitioner's Statement Of The Case provides, as if fact, selected excerpts of the testimony most favorable to its case; it in no way reflects the Findings of the lower court.

This is most evident in Petitioner's depiction of the police conduct in the instant case. Its argument that "Here, the undisputed and credited evidence established that the police scrupulously followed the law" (Petition For Writ Of Certiorari, 12) flies in the face of the articulated findings, including the following:

> Fifteen, prior and during Michael's interview the assigned detective knew that Michael was suffering from a profound major mental illness.

(continued...)

importantly, that respondent was suffering from his mental illness at the time of his interrogation and as a result was incapable of understanding or waiving his constitutional right against self-incrimination (Finding Twenty, Appendix "C").

Testimony[2] supportive of the hearing court's findings included the following:

> 1. Respondent was diagnosed, after a court-ordered psychiatric examination in 1982, as suffering from "either bipolar affective illness, or schizophrenia as schizo-affective type" (N.T. 138).[3] Respondent was hospitalized later that year with a diagnosis of schizophrenia (N.T. 137).
>
> 2. Medical records established that on August 22, 1983, less than two months before

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[1](...continued)

> Sixteen, the assigned detective skillfully manipulated Michael's mind through a process of reward and punishment.
>
> Seventeen, Michael was held for a series of suggestive and leading questions which resulted in his making an incriminating statement.
>
> Eighteen, despite continued cajoling by the assigned detective, Michael refused to sign the statement because he was no longer receiving any reward or punishment.

Appendix "C", Findings Fifteen through Eighteen.

[2] Contrary to the assertion of Petitioner, respondent did not "rel[y] exclusively on psychiatric evidence to support a claim of incompetency" (Petition for Writ of Certiorari, 8). Respondent and the lower court relied as well on the testimony of the prosecution witnesses, respondent's bizarre conduct from the time of his arrest through his interrogation, and respondent's arrest photograph.

[3] "N.T." designates the notes of testimony from the two evidentiary hearings on respondent's motion to suppress, which are consecutively paginated.

his arrest on this case, respondent had suffered an acute psychotic episode and was hospitalized "because he was found on a sixty-foot scaffold, disrobing himself, breaking windows and threatening to jump" (N.T. 208).

3. Medical records established that on September 21, 1983, less than three weeks before his arrest on this case, respondent was hospitalized after an acute psychotic episode in which he was found in a tree across the street from a schoolyard (N.T. 202-207).

4. Dr. Perry Berman, a psychiatrist, examined respondent repeatedly after his arrest in this case. He diagnosed respondent as schizophrenic (N.T. 130-133).

5. Dr. Richard Schwartzman, a psychiatrist at the Philadelphia Detention Center, examined respondent four days after his arrest in the instant case and diagnosed him as suffering from schizophrenia, undifferentiated type (N.T. 196-198).

6. At the time of his arrest on October 7, 1983, respondent was living in an alleyway near his parents' house. In the alley he kept bags of clothing, religious articles and costumes. Respondent often dressed in costumes, sometimes appearing as the prophet Moses (N.T. 18-20).

7. The arresting officer was begged by respondent's family to "Please get him put away somewhere" so he would get help for his mental problems. The arresting officer communicated this information to Officer Keenan, respondent's interrogator (N.T. 29-30).

8. Respondent was questioned twice by Officer Keenan. Between sessions, while in a locked detention room, he was hollering and kicking the door (N.T. 58).

9. Respondent, a black male, told police that he was the son of Ed Rendell [a white male, at the time District Attorney of Philadelphia] and had dined at the Rendell

home the night before his arrest (N.T. 58-59).

10. Richard Boroch, a licensed psychologist and Director of Social and Psychiatric Services at the Defender Association of Philadelphia, examined respondent on October 13, 1983. Respondent was deemed not to be competent to proceed to trial at that time; his affect was excited and included inappropriate laughter (N.T. 90-96).

11. When Mr. Boroch asked respondent whether he has had any hallucinations or visions, respondent stated that the answers are in the Bible (N.T. 96-97).

12. Mr. Boroch then arranged for respondent's immediate transfer to the prison hospital for treatment (N.T. 99).

13. Dr. Berman concluded, based upon his examinations of respondent, respondent's medical records, the police reports and the preliminary hearing testimony of Officer Keenan, that on October 7, 1983, respondent was suffering from the major mental illness schizophrenia and was incapable of understanding and intelligently waiving his constitutional rights (N.T. 139-141).

14. Dr. Berman explained that schizophrenia is a major disease of psychotic proportions which disturbs its victim's behavior and interferes with the ability to think in an organized way; that persons afflicted with schizophrenia may behave as one personality and then suddenly switch and behave like another personality; and that the schizophrenic mental state allows the individual to be highly suggestible and to follow others' requests and repeat back things others may have suggested, but without understanding how seriously others are taking his statements (N.T. 133, 141-142).

Petitioner sought reconsideration of the lower court's ruling, and the order suppressing respondent's statement was vacated. After additional argument, the order granting

suppression was reinstated on July 25, 1984. Petitioner then appealed this decision to the Superior Court of Pennsylvania.

The Superior Court twice (Appendices "A" and "B") unanimously affirmed Judge Avellino's order, validating the lower court's findings of fact as being supported by the record[4] and holding that the statement had to be suppressed as respondent was "incapable of comprehending the meaning of the Miranda warnings at the time he was interrogated" (Appendix "A", p. 8).

Petitioner then sought review in the Pennsylvania Supreme Court. That Court denied review in an Order dated August 20, 1987. The instant Petition for a Writ of Certiorari followed.

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[4] The findings of fact of a court ordering suppression, if supported by any evidence in the record, are deemed valid and final as a matter of state law. Commonwealth v. Hackney, 353 Pa. Super. 552, 510 A.2d 800 (1986); Commonwealth v. Brown, 341 Pa. Super. 138, 491 A.2d 189 (1985).

REASONS FOR DENYING THE WRIT

Respondent's statements, made to police during custodial interrogation in a police station, were suppressed because his major mental illness left him incapable of understanding and knowingly and intelligently waiving his right against self-incrimination. The Petition for Writ of Certiorari must be denied because petitioner's claim that a statement need not be suppressed where a suspect is incompetent and incapable of waiving his right against self-incrimination as long as the police engage in no coercive conduct is clearly meritless. Petitioner's painfully misguided view of the law is without any persuasive rationale and is contrary to every case decided by this Court in the past twenty-one years applying Miranda v. Arizona, 384 U.S. 436 (1966).

In Miranda, the Court required that an accused, subject to the coercive circumstances of custodial interrogation, be advised of his constitutional right against self-incrimination and that, absent the waiver of that right, "no evidence obtained as a result of interrogation can be used against him" 384 U.S. at 479 (footnote omitted). Such a waiver was required to be knowing and intelligent, the same as for any constitutional right.

> This Court has always set high standards of proof for the waiver of constitutional rights. Johnson v. Zerbst, 304 U.S. 458 (1938), and we reassert these standards as applied to in-custody interrogation. 384 U.S. at 475.

Thus, contrary to petitioner's assertions (Petition for Writ of Certiorari, 15-16) that a Johnson v. Zerbst analysis has no place in determining the validity of a Miranda waiver,* that standard was mandated by Miranda itself and has been continually reaffirmed and applied by this Court. Tague v. Louisiana, 444 U.S. 469, 470 (1980); North Carolina v. Butler, 441 U.S. 369, 374-5 (1979); cf., Oregon v. Bradshaw, 462 U.S. 1039, 1046 (1983); Fare v. Michael C., 442 U.S. 707, 725 (1979), reh. den. 444 U.S. 887.

The validity of a purported waiver is to be determined by "the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." Johnson v. Zerbst, 304 U.S. at 464; North Carolina v. Butler, 441 U.S. at 374-5. This includes evaluation of the suspect's

> age, experience, education, background and intelligence, and whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

Fare v. Michael C., 442 U.S. at 725 (emphasis added). It is precisely this inquiry that was conducted in respondent's case;

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* This issue was never presented to the suppression court, the Pennsylvania Superior Court, or in its Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. Accordingly, it is not properly preserved for review by this Court. Youakim v. Miller, 425 U.S. 231, 233-234 (1976); Lawn v. United States, 355 U.S. 339, 362-363, fn. 16 (1958); California v. Taylor, 353 U.S. 553, 557 fn. 2 (1957).

and precisely because he lacked the "capacity to understand" the warnings that his confession was suppressed.[6]

Petitioner is clearly wrong in branding "specious" (Petition for Writ of Certiorari, 18-19) the distinction between "voluntariness" and "knowing and intelligent." This precise distinction has been clearly drawn and utilized by this Court. Miranda set prerequisites under which "a defendant's statements might be excluded at trial despite their voluntary character

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[6] The suppression court found that respondent

> is not in touch with reality of the situation and he could not understand the significance of his so-called Miranda Warnings or competently waive his rights to remain silent or to have counsel present.

Appendix "C," Finding Twenty. At the hearing on the prosecution's request for reconsideration of the suppression order, the hearing judge succinctly explained the basis for his decision:

> THE COURT: Suppose Mr. Cephas was asleep, asleep or unconscious, at which time the officer, Officer Keenan, read him the Miranda Warnings while he was unconscious. He later woke up and was questioned and gave a statement. Would your argument be then that the statement should be admissible?
>
> THE PROSECUTOR: That is not what you have here.
>
> THE COURT: He was unconscious in my view. The same as if he had been drugged or was asleep. I don't think he understood the warnings.
>
> I don't think he is capable of understanding the warnings. I don't think he did understand them. I don't think he voluntarily gave up his right to remain silent.

(Hearing on Commonwealth Request for Reconsideration, July 18, 1984, p. 7).

under traditional principles." Michigan v. Tucker, 417 U.S. 433, 443 (1974).

> It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a known right or privilege...

Edwards v. Arizona, 451 U.S. 477, 482 (1981) (emphasis added); cf., Schneckloth v. Bustamonte, 412 U.S. 218, 238-241 (1973). The necessity for this two-fold inquiry was most recently reaffirmed by this Court this past term.

> A statement is not "compelled" within the meaning of the Fifth Amendment if an individual "voluntarily, knowingly and intelligently" waives his constitutional privilege. Miranda v. Arizona, supra, at 444. The inquiry whether a waiver is coerced "has two distinct dimensions." Moran v. Burbine, 475 U.S. ___, ___ (1986):
>
> > First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived." Ibid. (quoting Fare v. Michael C., 442 U.S. 707, 725 (1979).

Colorado v. Spring, ___ U.S. ___, ___, 107 S.Ct. 851, 857 (1987) (emphasis added).

For the same reason petitioner can find no support for its unprecedented claim in Colorado v. Connelly, ___ U.S. ___, 107

S.Ct. 515 (1987). There, this Court held that the confession of a person who understood the Miranda warnings, 107 S.Ct. at 519, would not be suppressed as involuntary where his mental condition compelled him to confess, as there was no coercive conduct by the police. The issue of whether the waiver was "knowing and intelligent" was not before this Court; police misconduct or coercion was held to be a necessary predicate only to a finding that the confession was involuntary. 107 S.Ct. at 524, fn 4; 107 S.Ct. at 533 (Brennan, J., dissenting).

To accept petitioner's arguments would be to validate the admission of statements, made after arrest and during police station interrogation, of a person incapable of understanding English, of a person with an intelligence quotient of a three year old, or of a person delirious due to illness, alcohol or drugs, as long as there was no provable police misconduct. This is not the law of this country, and it clearly should not be.

Miranda held the requirements of warnings and waiver to be

> fundamental...and not simply a preliminary ritual to existing methods of interrogation.
>
> The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant.

384 U.S. at 477. Petitioner failed to prove a valid waiver even by a preponderance of the evidence.

Respondent was mentally incompetent and without "the capacity to understand the warnings given him, the nature of his

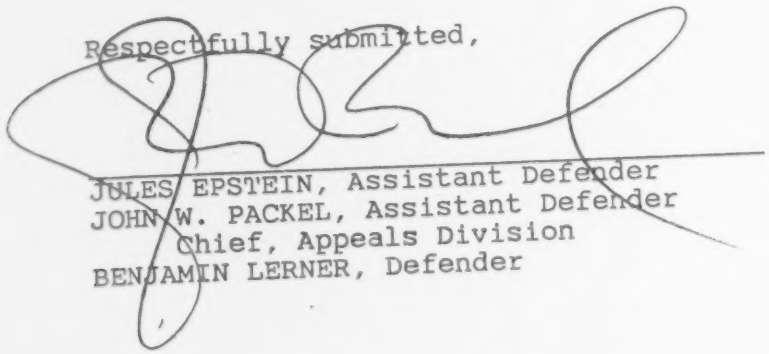
Fifth Amendment rights, and the consequences of waiving those rights." Fare v. Michael C., 442 U.S. at 725. The Findings of Fact entered by the suppression court were amply supported by the record and the order suppressing respondent's statements was in accordance with every decision of this Court interpreting and applying Miranda.

Review by this Court is therefore unwarranted.

CONCLUSION

For the foregoing reasons, respondent Michael Cephas, by his counsel, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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Chief, Appeals Division
BENJAMIN LERNER, Defender

P.D.

J. 56037/86 - 1

COMMONWEALTH OF PENNSYLVANIA, APPELLANT	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
V.	:	
MICHAEL CEPHAS	:	NO. 02288 PHILADELPHIA 1984

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED.

BY THE COURT:

David A. Szumski

PROTHONOTARY

Dated: MARCH 4, 1987

EXHIBIT "A"

COMMONWEALTH OF PENNSYLVANIA, APPELLANT : IN THE SUPERIOR COURT OF PENNSYLVANIA

V. :

MICHAEL CEPHAS : NO. 02288 PHILADELPHIA 1984

Appeal from the Order of July 18, 1984, in the Court of Common Pleas of Philadelphia County, Criminal Division, at No. 83-11-221-226.

BEFORE: WICKERSHAM, OLSZEWSKI AND BECK, JJ.

OPINION BY BECK, J.: FILED MAR -4 1987

The Commonwealth appeals an order granting a suppression motion. The court suppressed appellee's statements after finding that appellee did not knowingly waive his privilege against self-incrimination. We affirm.

Appellee was arrested on October 7, 1983 and charged with rape, indecent assault, indecent exposure, unlawful restraint, terroristic threats, and simple assault. He moved to suppress two statements made to police during custodial interrogation. After a hearing, the motion was granted. The Commonwealth petitioned the court to reconsider. The court vacated its order pending reconsideration. The court denied the petition and reinstated its order granting the motion to suppress. This timely appeal followed.

Initially, we note that we have jurisdiction of this appeal from a pre-trial suppression order because the Commonwealth certified in good faith that the order terminated or substantially

handicapped its prosecution. Commonwealth v. Dugger, 506 Pa. 537, 486 A.2d 382 (1985).

Appellee was arrested on the basis of the victim's description. He was taken to the Sex Crimes Unit of the Philadelphia Police. At the time of his arrest, appellee was a street person living in an alley near his foster family's home. He had a long history of mental illness and hospitalization for this illness. He had consistently been diagnosed as a schizophrenic. His most recent hospitalization was about two weeks before his arrest after he was seen in a tree near an elementary school screaming at the school children and yelling for the principal to meet his demands.

Appellee was known to the police to be suffering from mental illness. When the arresting officers came to observe the alley where appellee lived, his foster sister begged the officer to find help for appellee and to have him put away somewhere for his mental illness.

Upon his arrival at the Sex Crimes Unit, appellee was interviewed for background information. He was placed in handcuffs in a small detention room. He exhibited bizarre and psychotic behavior. The entire time he was in the detention room, he kicked the walls and the door, and he kept yelling inane comments, including that he was Ed Rendell's son and that he had dinner with Mr. Rendell the night before at Mr. Rendell's home. Mr. Rendell is the former District Attorney of Philadelphia and he is white. Appellee is black.

Appellee was initially interrogated in an office by a detective who knew that appellee suffered from mental illness. During this interrogation, appellee acted childishly. He refused to sit unless given a cigarette or soda and cookies. The detective ceased the interrogation and returned appellee to the detention room where appellee continued his bizarre behavior.

Appellee was interrogated again and he continued to display his childlike behavior. He was read the warnings mandated by Miranda v. Arizona, 384 U.S. 436 (1966), and he made incriminating statements. The court found that the interrogating detective knew that a statement was essential to the prosecution of the case. The victim had been unable to make a positive photo identification of appellee after his arrest. The court found that the detective skillfully manipulated appellee through a process of reward and punishment to make the statements.

At the hearing on the motion to suppress, the Commonwealth presented an expert who testified that appellee was capable of understanding his Miranda warnings and that he was capable of knowingly waiving his Fifth Amendment privilege against self-incrimination. Appellee presented two experts who testified to the contrary.

The court found after reviewing this testimony that appellee was incapable of understanding the significance of the Miranda

warnings and of making a competent waiver of his right to remain silent or of his right to have counsel present. The court accordingly concluded that the Commonwealth did not meet its burden to show a knowing waiver of the Constitutional right.

The Commonwealth contends that appellee voluntarily chose to speak after receiving Miranda warnings. The court, on the other hand, found that appellee did not voluntarily waive Miranda; it viewed his confession as the product of a deliberate effort on the part of the police detective to exploit appellee's mental weakness. We need not resolve this dispute. Regardless of whether a waiver of Miranda is voluntary, the Commonwealth must prove by a preponderance of the evidence that the waiver is also knowing and intelligent.

> Miranda holds that "[t]he defendant may waive effectuation" of the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and intelligently." The inquiry has two distinct dimensions. First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being adandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that Miranda rights have been waived.

Moran v. Burbine, 89 L Ed 2d 410, 421 (1986) (citations omitted). See also Edwards v. Arizona, 451 U.S. 477, 484 (1981); Tague v. Louisiana, 444 U.S. 469 (1980); Commonwealth v. Scarborough, 491 Pa. 300, ___, 421 A.2d 147, 153 (1980);

Commonwealth v. Cannon, 453 Pa. 389, 309 A.2d 384 (1973). Moreover, in reviewing an order granting a suppression motion, we are bound by the suppression court's findings of fact if the findings are supported by competent evidence. Commonwealth v. Hackney, ___ Pa. Super. ___, 510 A.2d 800 (1986).

With these principles in mind, we affirm the suppression court. The court found that appellee suffered from chronic undifferentiated schizophrenia and that this mental illness prevented him from understanding the Miranda warnings. The court also found that appellee was incapable of making a knowing and intelligent waiver of his privilege against self-incrimination. These findings are supported in the record by the testimony of Dr. Berman, appellee's expert. Dr. Berman based his opinion on a diagnosis of appellee after a personal interview and on appellee's previous mental health history. Dr. Berman's qualification as an expert was not challenged. Therefore, there is competent evidence to support the court's findings. Accordingly, the court correctly concluded that the Commonwealth failed to prove that appellee knowingly and intelligently waived his privilege against self-incrimination. We acknowledge that a Dr. Schwartzmann testified for the Commonwealth and disputed Dr. Berman's findings. However, this testimony only created a credibility issue. It is exclusively the province of the

suppression court to determine the credibility of the witnesses and the weight to be accorded their testimony. Commonwealth v. Neely, 298 Pa.Super. 328, ____, 444 A.2d 1199, 1205 (1982), overruled on other grounds, Commonwealth v. Holmes, 315 Pa. Super. 256, 461 A.2d 1268 (1983).

Finally, the Commonwealth contends that this case is controlled by Colorado v. Connelly, 93 L. Ed. 2d 473 (1986). In Connelly, a mentally ill defendant waived his Miranda rights because he believed that he was compelled to do so by the "voice of God." Id. at 480. The United States Supreme Court held that under the federal constitution this waiver would not be found to be involuntary in the absence of misconduct on the part of government officials. The Court, however, did not purport to decide whether Connelly's waiver was knowing and intelligent. See Id. at 487 n.4 (majority opinion) and at 488 n.5 (Brennan, J., dissenting). This remains a distinct and independent requirement for the admission of a confession into evidence. See Colorado v. Spring, 55 U.S.L.W. 4162, 4165 (U.S. Jan. 27, 1987).

In summary, federal law requires that a suppression court undertake a two step inquiry into the validity of a Miranda waiver. The court must first determine whether the waiver was voluntary in the sense of being the result of an intentional choice on the part of a defendant who had not been subject to undue governmental pressure. The court must then focus on cognitive factors to determine if the waiver was knowing and

intelligent - i.e. whether the defendant was aware of the nature of the choice that he made by giving up his Miranda rights.

In the case sub judice, the trial court found on the basis of credible evidence that appellee's confession was not made knowingly because he was incapable of comprehending the meaning of the Miranda warnings at the time he was interrogated. Accordingly, we affirm the suppression order. Cf. State v. Daily No. 16997, slip. op (W. Va. Dec. 16, 1986)(senile defendant with low intelligence and hearing loss did not knowingly waive Miranda).

Order affirmed.

Olszewski, J. files a Concurring Opinion.

J. 56037/86

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	
	:	PENNSYLVANIA
	:	
v.	:	
	:	
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	:	
MICHAEL CEPHAS,	:	
	:	
Appellant	:	No. 02288 Philadelphia 1984

Appeal from the Order of July 18, 1984, in the Court of Common Pleas of Philadelphia County, Criminal Division, at No. 83-11-221-226.

BEFORE: WICKERSHAM, OLSZEWSKI, and BECK, JJ.

CONCURRING OPINION BY OLSZEWSKI, J.:

Though agreeing with the majority's disposition of this particular case, I write separately to emphasize that this decision is limited to the facts of this case. The majority's holding does not establish a per se rule that an accused is incapable of waiving his constitutional rights whenever he asserts that he is suffering from a mental illness. Both this Court and our Supreme Court have recognized that the mental or physical deficiencies of an accused are not conclusive evidence of an accused's inability to waive his constitutional rights. See Commonwealth v. Glover, 488 Pa. 459, 412 A.2d 855 (1980) (there is no per se rule of inability to waive constitutional rights based on mental deficiencies); Commonwealth v. Neely, 298 Pa.Super. 328, 444 A.2d 1199 (1982) (a defendant may be suffering from a mental illness and still be capable of waiving his constitutional rights).

Trial judges, consequently, should be more wary of concluding that an accused is incapable of waiving his constitutional rights merely because he suffers from a mental illness. The trial judge must thoroughly examine all the circumstances surrounding the particular case to determine if the accused made a knowing and intelligent waiver. See Glover, supra.

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Initially, we note that we have jurisdiction of this appeal from a pre-trial suppression order because the Commonwealth certified in good faith that the order terminated or substantially

handicapped its prosecution. Commonwealth v. Dugger, 506 Pa. 537, 486 A.2d 382 (1985).

Appellee was arrested on the basis of the victim's description. He was taken to the Sex Crimes Unit of the Philadelphia Police. At the time of his arrest, appellee was a street person living in an alley near his foster family's home. He had a long history of mental illness and hospitalization for this illness. He had consistently been diagnosed as a schizophrenic. His most recent hospitalization was about two weeks before his arrest after he was seen in a tree near an elementary school screaming at the school children and yelling for the principal to meet his demands.

Appellee was known to the police to be suffering from mental illness. When the arresting officers came to observe the alley where appellee lived, his foster sister begged the officer to find help for appellee and to have him put away somewhere for his mental illness.

Upon his arrival at the Sex Crimes Unit, appellee was interviewed for background information. He was placed in handcuffs in a small detention room. He exhibited bizarre and psychotic behavior. The entire time he was in the detention room, he kicked the walls and the door, and he kept yelling inane comments, including that he was Ed Rendell's son and that he had dinner with Mr. Rendell the night before at Mr. Rendell's home. Mr. Rendell is the former District Attorney and he is white.

Appellee is black. A photograph taken of appellee while in custody reflects his reaction to his arrest.

Appellee was initially interrogated in an office by a detective who knew that appellee suffered from mental illness. During this interrogation, appellee acted childishly and manipulatively. He refused to sit unless given a cigarette or soda and cookies. The detective ceased the interrogation and returned appellee to the detention room where appellee continued his bizarre behavior.

Appellee was interrogated again and he continued to display his childlike behavior. He was read his Miranda warnings and made incriminating statements. The court found that the interrogating detective knew that a statement was essential to the prosecution of the case. The victim had been unable to make a positive photo identification of appellee after his arrest. The court found that the detective skillfully manipulated appellee through a process of reward and punishment to make the statements.

At the hearing on the motion to suppress, the Commonwealth presented an expert who testified that appellee was capable of understanding his Miranda warnings and that he was capable of knowingly waiving his Fifth Amendment privilege against self-incrimination. Appellee presented two experts who testified to the contrary.

The court found after reviewing this testimony that appellee was incapable of understanding the significance of the Miranda

warnings and of making a competent waiver of his right to remain silent or of his right to have counsel present. The court accordingly concluded that the Commonwealth did not meet its burden to show a knowing waiver of the Constitutional right.

The Commonwealth contends that it complied with the mandates of Miranda v. Arizona, 384 U.S. 436 (1966) and that the statements obtained from appellee should be admissable at trial. Although the Commonwealth fervently argues that the Miranda rules were observed, the court found otherwise and concluded that appellee's statements were involuntary. We need not, however, review this finding. Aside from compliance with Miranda, the Commonwealth must also prove by a preponderance of the evidence that the accused knowingly and intelligently waived his Fifth Amendment privilege for statements that are the product of custodial interrogation to be admissable. Tague v. Louisiana, 444 U.S. 469 (1980); Johnson v. Zerbst, 304 U.S. 458 (1938); Commonwealth ex rel. Butler v. Rundle, 429 Pa. 141, 239 A.2d 426 (1968). Moreover, the Commonwealth must show that the accused was competent to make a knowing and intelligent waiver when the accused claims a lack of competence. See Commonwealth v. Cannon, 453 Pa. 389, 309 A.2d 384 (1973); LaFave & Israel, CRIMINAL PROCEDURE § 6.9(b), at 307 (1985). Also, in reviewing an order granting a suppression motion, we are bound by the suppression

court's findings of fact if the findings are supported by competent evidence. Commonwealth v. Hackney, ___ Pa.Super. ___, 510 A.2d 800 (1986).

With these principles in mind, we affirm the suppression court. The court found that appellee suffered from chronic undifferentiated schizophrenia and that this mental illness prevent appellee from understanding the Miranda-warnings. The court also found that appellee was incapable of making a knowing and intelligent waiver of his privilege against self-incrimination. These findings are supported in the record by the testimony of Dr. Berman, appellee's expert. Dr. Berman based his opinion on a diagnosis of appellee after a personal interview and on appellee's previous mental health history. Dr. Berman's qualification as an expert was not challenged. As such, there is competent evidence to support the court's findings. Accordingly, the court correctly concluded that the Commonwealth failed to prove that appellee knowingly and intelligently waived his privilege against self-incrimination. We acknowledge that Dr. Schwartzmann testified for the Commonwealth and disputed Dr. Berman's findings. However, this testimony only created a credibility issue. It is exclusively the province of the suppression court to determine the credibility of the witnesses and the weight to be accorded their testimony. Commonwealth v. Neely, 298 Pa.Super. 328, ____, 444 A.2d 1199, 1205 (1982), overruled on other grounds, Commonwealth v. Holmes, 315 Pa. Super.

256, 461 A.2d 1268 (1983).

The Commonwealth strenuously argues that the statements should be admitted because it complied with the Miranda requirements. Whether or not the Commonwealth complied with Miranda is not relevant. If the Commonwealth sustained its burden to prove compliance with Miranda, it had to also prove that a waiver was made knowingly and intelligently. Under these facts, part of this burden was to prove that appellee was competent to make a knowing and intelligent waiver. The burden to show competence was not met. Therefore, the burden to show a knowing and intelligent waiver was not met, and the statements were correctly suppressed.

Order affirmed.

Olszewski, J., files Concurring Opinion.

J. 56037/86

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MICHAEL CEPHAS, Appellant	:	No. 02288 Philadelphia 1984

Appeal from the Order of July 18, 1984, in the Court of Common Pleas of Philadelphia County, Criminal Division, at No. 83-11-221-226.

BEFORE: WICKERSHAM, OLSZEWSKI, and BECK, JJ.

CONCURRING OPINION BY OLSZEWSKI, J.: FILED DEC 15 1986

Though agreeing with the majority's disposition of this particular case, I write separately to emphasize that this decision is limited to the facts of this case. The majority's holding does not establish a per se rule that an accused is incapable of waiving his constitutional rights whenever he asserts that he is suffering from a mental illness. Both this Court and our Supreme Court have recognized that the mental or physical deficiencies of an accused are not conclusive evidence of an accused's inability to waive his constitutional rights. See Commonwealth v. Glover, 488 Pa. 459, 412 A.2d 855 (1980) (there is no per se rule of inability to waive constitutional rights based on mental deficiencies); Commonwealth v. Neely, 298 Pa.Super. 328, 444 A.2d 1199 (1982) (a defendant may be suffering from a mental illness and still be capable of waiving his constitutional rights).

Trial judges, consequently, should be more wary of concluding that an accused is incapable of waiving his constitutional rights merely because he suffers from a mental illness. The trial judge must thoroughly examine all the circumstances surrounding the particular case to determine if the accused made a knowing and intelligent waiver. See Glover, supra.

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CRIMINAL TRIAL DIVISION

- - -

COMMONWEALTH	:	NOVEMBER TERM, 1983
	:	
	:	0221 Indecent Exposure
	:	0222 Indecent Assault
	:	0223 Rape
	:	0224 Unlawful Restraint
	:	0225 Terroristic Threats
MICHAEL CEPHAS	:	0226 Simple Assault

- - - -

July 25, 1984

Courtroom 436, City Hall

Philadelphia, Pennsylvania

- - - -

BEFORE: HONORABLE BERNARD AVELLINO, J.

- - - -

APPEARANCES:

SARAH VANDENBROOK, ESQUIRE
Assistant District Attorney
For the Commonwealth

JULES EPSTEIN, ESQUIRE
Assistant Public Defender
Counsel for the Defendant

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EXHIBIT "C"

At this time I will give you my Findings of Fact. There will be no Findings of Fact on the issue of probable cause to arrest the defendant as that issue is not seriously challenged by the defendant at no time. Someone can always re-file.

The Findings of Fact will all relate to the defendant's capabilities of knowingly and voluntarily waiving his constitutional rights.

The Findings of Fact are as follows:

One, Michael Cephas, 23-year-old defendant was arrested on October 7th, 1983, was on the streets of the City and County of Philadelphia.

Two, following his arrest he was taken to the Sex Crimes Unit, Frankford and Castor Avenues and placed in a small detention

room in handcuffs in anticipation of questioning about a reported rape at the chapel of the University of Pennsylvania Hospital on 7/29/83. He, at the time of his arrest and detention, Michael had an extensive history of profound mental illness. He had consistently been diagnosed as a schizophrenic of the most serious type.

Michael spent from October the 7th, 1982 to November the 5th, 1982 at Philadelphia Psychiatric Center. Again in August of 1993 he was taken to Saint Mary's Hospital by the Philadelphia police where he was found naked on a scaffold sixty feet up in the area of City Hall.

On September 21st 1983, he was again taken by the police to Saint Mary's because he was up in a tree and by an elementary school screaming at the school children and yelling for the principal to meet his demands. According to the records of Saint Mary's Hospital that was his fourth hospital admission for psychiatric psychotic episodes in that institution alone.

The Court notes the proximity in time of his arrest of October the 7th.

Four, at the time of his arrest Michael was a street person. He lived in an alley not far from the home of his foster family. In this alley he kept a series of costumes neatly arranged in bags and stacks. He has been known by police to dress as Moses, a preacher, a lumberjack who could climb buildings and trees and punk rocker.

Five, when the arresting officers came to observe the alley where Michael lived his foster sister begged the officer to find help for Michael and to have him put away somewhere for his mental illness.

Six, Michael's behavior when he was at the interrogation by the police at the police headquarters and during his confinement in the detention room was bizarre and psychotic. The entire time he was put in a small detention room handcuffed, he kicked the door, walls and kept yelling inane comments, including that he was Ed Rendell's son, that he had dinner with his father the night before at Mr. Rendell's home,

Mr. Rendell who is the D.A. for the City and County of Philadelphia.

Seven, the photograph taken of Michael when he was taken into custody reflects his reaction to this predicament.

Eight, during the first interrogation Michael acted very childishly and manipulatively. He refused to sit down unless he was given a cigarette. He wanted the police to give him a soda and cookies. He was unable to take the questioning seriously. And the interrogating officer finally abandoned the interview believing him to be pompous.

Nine, during the absence of the assigned detective Michael continued his earlier impulsive childhood behavior again in the detention room.

Ten, the assigned detective during her absence was unable to obtain an identification of Michael by his alleged victim despite the fact that the victim had been face-to-face with her assailant for forty-five minutes and had earlier provided data to a police artist which resulted in a positive

sketch which led to Michael's arrest and detention.

Eleven, the assigned detective knew that upon her return to the Sex Crimes Unit that unless Michael confessed to the crime she would have to release him.

Twelve, Michael stopped hollering and banging, but when he was released from the Detention Center he did, however, continue child-like behavior. He did, for example, remain standing despite instructions to sit and he continued his defiance until he was prodded by a cigarette. He was moreover given cookies and soda to reinduce him to adopt a more cooperative attitude.

Thirteen, prior to his being given cigarettes, cookies and soda, Michael was read the Miranda Warnings to which he gave verbal responses ostensively suggesting he wished to surrender his right to remain silent and/or to counsel.

Fourteen, Michael's psychosis includes a split personality. The other person inhabiting Michael's body is named Johnny

Johnson.

Fifteen, prior and during Michael's interview the assigned detective knew that Michael was suffering from a profound major mental illness.

Sixteen, the assigned detective skillfully manipulated Michael's mind through a process of reward and punishment.

Seventeen, Michael was held for a series of suggestive and leading questions which resulted in his making an incriminating statement.

Eighteen, despite continued cajoling by the assigned detective, Michael refused to sign the statement because he was no longer receiving any reward or punishment.

Nineteen, the expert testimony was in agreement on one point, and that was that Michael is suffering with serious schizophrenia. His behavior during the interrogation is consistent with this diagnosis.

All experts agree that medication can help control such symptoms but there is no substantial evidence this Court found credible

that any drugs had been administered to this defendant and his behavior at the time of the interviews suggest just the opposite.

Twenty, Michael's conduct during the interrogation shows conclusively that he did not appreciate legal jeopardy of this position. His childish and manipulative behavior and long history of mental illness is convincing he is not in touch with reality of the situation and he could not understand the significance of his so-called Miranda Warnings or competently waive his rights to remain silent or to have counsel present.

Conclusions to be drawn from the following Findings of Fact is that the defendant, Michael Cephas, was not capable of knowingly and voluntarily waiving his constitutional rights when he made the statement to the police after receiving his so-called Miranda Warnings.

The Commonwealth had the burden to prove by the preponderance of the evidence the defendant's statement was a knowing and voluntary waiver of his right not to incriminate himself. The Commonwealth did not meet that

burden in the Court's view.

It is, of course, my responsibility to determine credibility and weight of the witnesses before their testimony. The Court is mindful of a line of cases which suggest in these cases that mentally ill people can voluntarily surrender their right. Notwithstanding that case, the Court is satisfied with this decision in this particular case Michael was incapable at the time that he was interviewed to waive his rights.